IN THE HIGH COURT OF JUSTICE **Claim No.**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

BETWEEN:-

THE QUEEN
on the application of
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Defendant

- and -

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

STATEMENT OF FACTS AND GROUNDS

---

*Page references below are to the pages of the claim bundle. They are expressed as: [**CB/x**] where CB stands for Core Bundle and x is the page number; and [**SB/x**] where SB stands for Supplementary Bundle and x is the page number.*

Key documents:

- *Statement of Facts and Grounds [CB/9-42]*
- *Witness statement of Chris Todd [CB/43-47]*
- *Pre-action correspondence [CB/63-77; 48-57]*

A. INTRODUCTION

1. As explained in the witness statement of Chris Todd [**CB/43-47**], which the court is asked to read in full, the Claimant is an NGO which is concerned with the environmental impacts of the transport sector, including the impacts of the road transport sector on climate change and air quality.

2. The Interested Party (Highways England: "HE") is a "strategic highways company" appointed by the Secretary of State ("**SofS**") pursuant to section 1 of the Infrastructure Act 2015 ("**IA 2015**"). The SofS is HE's sole shareholder and sole client. HE's remit relates to the "Strategic Road Network" ("**SRN**") - motorways and major A-roads – as distinct from local highways which are the responsibility of local highway authorities, typically upper-tier councils.

3. The Claimant challenges the legality of the SofS' Second Roads Investment Strategy ("**RIS2**"), which covers the period 2020 to 2025. Its predecessor, RIS1, had been 'set' in December 2014 to cover the period 2015 to 2020. RIS2 was set by the SofS on 11 March 2020, pursuant to subsections 3(1) and (7) IA 2015 (subsection (1) empowers the SofS to set a RIS, and subsection (7) requires him to maintain a current one).

4. RIS2 not only allocates funding, but also determines which specific road projects, including projects to increase road capacity (termed 'capital enhancements') that the Interested Party is required by statute (see section 3(6) IA 2015) to take forward during the relevant period. RIS2 also sets performance specifications for HE in managing the SRN and undertaking the required projects.

5. The SofS's setting of RIS2 was unlawful for any or all of the following reasons:

    a. **Ground 1:** In setting RIS2, the SofS unlawfully failed to take account of the impact of RIS2 on achieving specific climate change objectives (when they were a mandatory material consideration) when discharging the SofS's duty under section 3(5)(a) IA 2015 (which required the SofS to have regard to the effect of RIS2 on the environment). Specifically, the SofS failed to take account of the impact of RIS2 on achieving:

        i. The carbon budgets set by the Government pursuant to section 4 Climate Change Act 2008 ("**CCA 2008**") and, in particular, the "fifth carbon budget" covering the period 2028-2032;

ii. The target set by section 1 CCA 2008 for the net UK carbon account to be zero by 2050[1] ("**the Net Zero Target**"); and

iii. The objectives of the Paris Agreement on climate change (adopted by the parties to the United Nations Framework Agreement on Climate Change ("**UNFCCC**") in December 2015 and ratified by the UK in November 2016) and, in particular, the fact that the Paris Agreement sets temperature-based goals (which require a focus on carbon emissions over time; i.e. not just in 2050 itself), and of its principles of equity between developed and developing countries, as explained further below.

b. **Ground 2:** In setting RIS2, the SofS unlawfully breached the Claimant's legitimate expectation that prior to setting, or at the very latest when setting RIS2, he would establish, or require HE to establish, a metric for measuring the emissions of greenhouse gases ("**GHG**") from road users, which make up the majority of GHG emissions arising from the Strategic Road Network (a "**User Metric**").

c. **Ground 3:** The SofS unlawfully failed to take account of the duties placed on him by regulation 17 of the Air Quality Standards Regulations 2010 ("**AQ Regulations**") – namely the requirement to ensure that levels of specified pollutants do not exceed specified limit values, and/or where they do not exceed limit values, to maintain the best air quality compatible with sustainable development. The SofS also unlawfully failed to take account of the cross-Governmental Clean Air Strategy, published in January 2019, which is the air quality plan required pursuant to regulation 26 where air pollution exceeds limit values, and which by regulation 26(2) must ensure compliance with those limit values within the shortest time possible.

[1] i.e. that, in the year 2050, the emissions of carbon produced into the atmosphere by the UK will be balanced by the carbon which it removes from the atmosphere (which says nothing about the position in other years)

By requiring increased road capacity, and therefore enabling additional road traffic, the SofS increased the risks: (1) of creating new exceedances of limit values, (2) of prolonging existing exceedances; and (3) of worsening air quality even where limit values were not exceeded. The potential conflicts with duties under the air quality legislation were so obvious that they were matters to which the SofS could not lawfully fail to have regard in discharging the duty under section 3(5)(a) IA 2015 (namely to have regard to the effect of RIS2 on the environment). However, the SofS failed even to perform any analysis of the impact of schemes required by RIS2 on levels of air pollutants. Had he done so, that could have led him to promote transport options with lesser pollution impacts.

d. **Ground 4:** Contrary to regulation 5(1) of the Environmental Assessment of Plans and Programmes Regulations 2004 ("**SEA Regulations**"), the Defendant failed to carry out Strategic Environmental Assessment ("**SEA**") of RIS2. SEA was required because RIS2 is a plan or programme that sets the framework for future development consent of road schemes (or where no development consent is required, consenting by HE). Accordingly, SEA was mandatory under the terms of the SEA Regulations.

B. BACKGROUND

The Climate Emergency

6. As explained by the Intergovernmental Panel on Climate Change ("**IPCC**") in its Special Report on Global Warming of 1.5°C ("**the Special Report**") in October 2018, and not disputed by the SofS, anthropogenic emissions of greenhouse gases, together with the degradation of natural carbon sinks such as forests, are causing an energy imbalance in the earth's atmosphere that is warming the planet; to date, human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels;[2] and the impacts of this warming on human well-being and the natural

[2] **Special Report on Global Warming of 1.5°C**, Intergovernmental Panel on Climate Change, June 2019. Summary for Policy Makers, para. A.1 [**SB/169**]

environment are overwhelmingly negative. Catastrophic events such as flooding, droughts and wildfires linked to extreme weather conditions are already occurring with increased frequency and severity.

7. These impacts and events will continue to increase in the coming decades, but they can be made less severe if deep and early reductions in greenhouse gas emissions can be achieved. The Special Report analysed the differences in impacts as between warming of 1.5°C and warming of 2°C, and found in the latter scenario, among other differences:

    a. There would be increased risks from droughts and conversely from floods[3];

    b. There would be an additional 10cm of sea-level rise by 2100[4];

    c. Greater impacts on biodiversity and ecosystems, both on land and in the oceans;[5]

    d. There would be a greater risk for people of heat-related morbidity and mortality, and of vector-borne diseases such as malaria and dengue fever;[6]

    e. There would be smaller net reductions in yields of maize, rice, wheat, and potentially other cereal crops, particularly in developing regions of the world;[7]

    f. Adaptation to climate change is more challenging, and in some vulnerable regions the capacity to adapt to climate impacts may not exist for warming above 1.5°C.[8]

---

[3] Ibid, para. B.1.3 [**SB/170**]
[4] Ibid, para. B.2 [**SB/170**]
[5] Ibid, paras. B.3 – B.4 [**SB/171-2**]
[6] Ibid, para. B.5.2 [**SB/172**]
[7] Ibid, para B.5.3 [**SB/172**]
[8] Ibid, para. B.6.2 – 6.3 [**SB/173**]

8. The Special Report went on to analyse the global emissions trajectories that will be necessary to limit warming to the two thresholds. It found that holding warming to 1.5°C with no or limited overshoot requires global net anthropogenic CO_2 emissions to decline by about 45% from 2010 levels by 2030, and to reach 'net zero' (that is, where any emissions are balanced by removals of greenhouse gases from the atmosphere) around 2050.[9]

9. However (and key here), the Special report also stressed that limiting global warming requires limiting total cumulative greenhouse gas emissions over time up to that point (because the extent of global warming is a function of the total emissions over time). That requires staying within a "carbon budget"[10] even on the way to getting to the point where the levels of emissions in 2050 itself are "net zero". Because the climate system responds to total cumulative emissions, it is the extent of those emissions in the intervening years, rather than just the emissions level in the particular year of 2050, which is the primary determinant of how much human-induced warming will occur overall (and thus by how much global temperatures, as considered by the Paris Agreement as explained below, will rise) by that point.

10. The Special Report found that emissions pathways consistent with warming of 1.5°C:

> "would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings) […] These systems transitions are unprecedented in terms of scale, but not necessarily in terms of speed, and imply deep emissions reductions in all sectors, a wide portfolio of mitigation options and a significant upscaling of investments in those options".[11]

11. On 1 May 2019, in recognition of the scale and urgency of the challenge of climate change, the House of Commons declared a climate change emergency.

---

[9] Ibid, para C.1 [**SB/175**]

[10] Ibid, para C.1.3 [**SB/175**]

[11] Ibid, para C.2 [**SB/178**]

The Paris Agreement

12. In December 2015 the parties to the United Nations Framework Agreement on Climate Change ("**UNFCCC**"), including the UK, adopted the Paris Agreement [**SB/89-93**]. The UK ratified the Paris Agreement in November 2016.

13. The Paris Agreement aims to strengthen the global response to climate change, including by limiting warming "to well below 2°C above pre-industrial levels" and pursuing efforts to limit the increase to 1.5°C (Article 2.1). To stay within this temperature goal, Article 4(1) of the Paris Agreement requires Parties to aim to reach global peaking of emissions as soon as possible, recognizing that peaking will take longer for developing countries. Thereafter, Parties are to undertake rapid emissions reductions in accordance with best available science, in order to achieve net zero global emissions in the second half of this century (i.e. from 2050). In other words, Paris embodies not just a 2050 consideration, but also a focus on emissions in the years up to that point. That is key here.

The Climate Change Act 2008

14. Section 1 of the Climate Change Act 2008 ("**the CCA**"), as amended by The Climate Change Act 2008 (2050 Target Amendment) Order 2019 ("**the 2019 Order**") with effect from 27 June 2019, requires the UK Government to reduce net emissions of 'targeted greenhouse gases' to zero by 2050 ("**the Net Zero Target**").

15. The 2019 Order was made following the May 2019 advice of the statutory Committee on Climate Change ("**CCC**") that the target specified in section 1 CCA 2008 should be increased from an 80% reduction to a 100% reduction ("**the Net Zero Advice**").[12] The recommendation for a Net Zero Target was intended to reflect the climate science synthesised in the Special Report, and the UK's obligations under the Paris Agreement.

[12] **Net Zero – The UK's contribution to stopping global warming**, CCC, May 2019 [**SB/150-154**]

16. Sections 4 to 10 of the CCA 2008 then create a scheme of five-yearly "carbon budgets" which specify what is to happen in those periods in the context of heading for 2050. At present, the Secretary of State has legislated for the amounts of such carbon budgets up to and including the fifth carbon budget, which covers the period 2028-2032. However, all the existing carbon budgets were set that way before the Net Zero Target was adopted in 2019.

17. In other words – and key here – the carbon budgets were set when the target under section 1 CCA was for only an 80% reduction (not the 100% reduction now required) in emissions relative to 1990 levels.

18. The CCC has advised that the fourth and fifth carbon budgets are "therefore are likely to be too loose".[13]

19. Sections 13 and 14 of the CCA 2008 then go on to require the Government to prepare and report on policies and proposals to enable the carbon budgets to be met. Pursuant to those provisions, the Government published its "Clean Growth Strategy" ("**CGS**") in 2017[14]. The CGS contains policies and proposals intended by Government to meet the fourth and fifth carbon budgets. However, as the CCC has stated in its Net Zero Advice, the Clean Growth Strategy still "does not fully close the policy gap to the UK's existing carbon budgets", and its intentions "still need to be backed up by detailed policy designs in many cases" so that, overall, "policy is not yet on track to meeting those budgets".[15]

20. The effect, overall, is that the CGS is not sufficient to bring about compliance with the existing carbon budgets and they are anyway not sufficient to bring about compliance with Net Zero (in 2050).

---

[13] Ibid, p.30 [**SB/152**]

[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf

[15] p.16, p.191 [**SB/153**]

21. One sector in which policy is notably 'off-track' is road transport, which accounts for the large bulk (91%) of UK domestic transport emissions[16] and 25% of total UK domestic emissions. Although there are no up to date figures showing GHG emissions from use of the SRN, the 2018 Road Traffic Forecasts published by the SofS include data for CO_2 by type of road in 2015 These show that emissions from the SRN in England in 2015 (35.6 $MtCO_2$) were equivalent to around 29% of the UK's domestic transport emissions (122.2 $MtCO_2$) or 32% of total road emissions in 2015.

22. Moreover, emissions from road transport have barely declined since 1990, because (as the SofS himself acknowledges) "progress through regulation to improve the efficiency of new passenger cars has been largely offset by their increased use".[17] On the basis of current policies, the SofS predicts a slow reduction in overall domestic transport emissions, from around 124 $MtCO_2e$ today, to approximately 80 $MtCO_2e$ in 2050, when to achieve compliance with the Net Zero Target such emissions would need to be at or very close to zero.[18] More immediately, the SofS forecasts an excess relative to compliance with the fifth carbon budget:

> "the UK must go much further in reducing domestic transport emissions than currently projected if we are to meet the emission levels set out in the 2032 Clean Growth Strategy scenario (there is an estimated gap of 16 $MtCO_2e$ between this and DfT's current projection in 2032)[19]."

23. Overall, therefore, while the UK's Net Zero Target is considered by the CCC to align with the UK's obligations under the Paris Agreement:

    a. Current carbon budgets reflect an earlier, less stringent target and are therefore likely to be too large (in order to meet Net Zero);

    b. Current Government policy in the CGS is not ambitious or detailed enough to meet even those budgets; and

---

[16] **Decarbonising Transport: Setting the Challenge**, Department for Transport, 26 March 2020, para 3.3 [**SB/183**]

[17] Ibid, para 1.10 [**SB/182**]

[18] Ibid, Figure 18 on p.56 [**SB/186**]

[19] Ibid, para 4.5 [**SB/185**]

c. Within that, the trajectory of road transport emissions causes a particular problem for meeting the fifth carbon budget.

Air Pollution and Air Quality Legislation

24. As explained in the Ministerial Foreword to the UK's Clean Air Strategy, "air pollution is the top environmental risk to human health in the UK, and the fourth greatest threat to public health after cancer, heart disease and obesity."[20] The Royal College of Physicians estimated in 2016 that around 40,000 deaths in the UK annually are attributable to exposure to outdoor air pollution, due to the links between air pollution and cancer, asthma, stroke and heart disease, diabetes, obesity, and changes linked to dementia. It estimated that the costs of exposure to air pollution on UK individuals, health services and businesses to be more than £20 billion every year.[21] Road transport accounts for a high proportion of the impact of air pollution on human health, both because it is a major source in absolute terms, and because it is the source of air pollution that occurs nearest to human activity.

25. The Air Quality Standards Regulations 2010 ("**the AQ Regulations**") implement Directive 2008/50/EC ("**the AQ Directive**"). The AQ Directive and AQ Regulations aim to ensure that air pollution is reduced 'to levels which minimise harmful effects on human health' (AQ Directive, Recital 1). The AQ Regulations establish 'limit values' for the air pollutants listed in Schedule 2 to the AQ regulations. Regulation 17 places duties on the Secretary of State in relation to these limit values, including as follows

> "(1) The Secretary of State must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2.

[20] [**SB/142**]

[21] **Every breath we take: the lifelong impact of air pollution**, Royal College of Physicians, 2016 (https://www.rcplondon.ac.uk/file/2912/download)

(2) In zones where levels of the pollutants mentioned in paragraph (1) are below the limit values set out in Schedule 2, the Secretary of State must ensure that levels are maintained below those limit values and must endeavour to maintain the best ambient air quality compatible with sustainable development."

26. The remedy for a breach of regulation 17(1) is the requirement, imposed by regulation 26, to draw up an air quality plan: **Shirley v Secretary of State for Housing, Communities and Local Government** [2019] EWCA Civ 22). Regulation 26 provides that:

"(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values in Schedule 2 […], the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.

(2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time."

27. Since 2010, air quality in the UK has exceeded the limit values at a large number of monitoring sites, including numerous roadside sites: analysts have stated that the most recent monitoring data indicates that levels of nitrogen dioxide exceed limit values at sites on over a third of SRN roads.[22] The UK Government has produced a series of Air Quality Plans pursuant to Regulation 26. The courts have intervened on three occasions to quash these[23], on the basis in each case that they did not achieve compliance "within the shortest possible time" as required by Regulation 26(2).

[22] https://airqualitynews.com/2019/11/07/exclusive-highways-england-failing-to-spend-75m-air-pollution-fund/

[23] R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No.3) [2018] EWHC 315 (Admin); ClientEarth v Secretary of State for the Environment, Food and Rural Affairs [2016] EWHC 2740 (Admin); R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28

The statutory requirements relating to a RIS

28. As below, section 3(1) of the IA 2015 empowers the SofS to set a Road Investment Strategy ("**RIS**"); section 3(7) requires him to do so where a strategic highways company does not currently have one; sections 3(3)-(4) provide for the content of such a RIS; section 3(5)(a) requires the SofS in making a RIS to consider, among other things, the impact of a RIS on the environment; section 3(6) requires the SofS and the strategic highways company to comply with the RIS (a requirement monitored, pursuant to sections 10 and 11 IA 2015, by the Office of Rail and Road ("**ORR**"), which has power to fine a strategic highways company for non-compliance with a RIS) and section 3(8) gives effect to Schedule 2 to the IA 2015, which makes detailed rules about the procedure for setting a RIS (s.3(8)):

> **"3 Road Investment Strategy**
>
> (1) The Secretary of State may at any time—
>
> (a) set a Road Investment Strategy for a strategic highways company, or
>
> (b) vary a Strategy which has already been set.
>
> (2) A Road Investment Strategy is to relate to such period as the Secretary of State considers appropriate.
>
> (3) A Road Investment Strategy must specify—
>
> (a) the objectives to be achieved by the company during the period to which it relates, and
>
> (b) the financial resources to be provided by the Secretary of State for the purpose of achieving those objectives.
>
> (4) The objectives to be achieved may include—
>
> (a) activities to be performed;
>
> (b) results to be achieved;

(c) standards to be met.

(5) In setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on—

(a) the environment, and

(b) the safety of users of highways.

(6) The Secretary of State and the company must comply with the Road Investment Strategy.

(7) If a strategic highways company does not have a Road Investment Strategy currently in place, the Secretary of State must—

(a) lay before Parliament a report explaining why a Strategy has not been set, and

(b) set a Road Investment Strategy as soon as may be reasonably practicable.

(8) Schedule 2 (which contains provision about the procedure for setting or varying a Road Investment Strategy) has effect."

The setting of RIS1 then RIS2

29. RIS1 was set in December 2014 and covers the period 1 April 2015 to 31 March 2020. As the SofS was required by section 3(7) to maintain continuity between one RIS and the next, he prepared RIS2 and set it on 11 March. RIS2 covers the period 1 April 2020-31 March 2025.

30. The core of RIS2 is in three parts: Strategic Vision, Performance Specification, and Investment Plan. The scheme of RIS2 is described by its "Introduction" as follows: (RIS2 p.3 [**CB/87**]):

> "This second Road Investment Strategy (RIS2) sets a long-term strategic vision for the network. With that vision in mind, it then: specifies the performance standards Highways England must meet; lists planned enhancement schemes we expect to be built; and states the funding that we will make available during the second Road Period (RP2), covering the financial years 2020/21 to 2024/25." [underlining added]

31. Pages 93 to 106 of RIS2 contain a list of the major specific schemes that the SofS requires HE to take forward.[24] This list is preceded by a text box explaining "the nature of commitments in RIS2", in which the SofS is at pains to emphasise the specificity with which RIS2 determines not only the location, but also the timing, of the various road schemes it requires (RIS p.91 [**CB/175**]):

> "A RIS is built around a series of investment commitments to specific infrastructure projects. Unlike historic infrastructure programmes, a RIS makes clear and accountable promises about which projects are expected to proceed and by when. This process for planning strategic road investment is amongst the most transparent and explicit in the world.
>
> Whereas historic infrastructure programmes have promised action at an unspecified point in the future, RIS2 is built around a structure of commitments that expect projects to enter construction by 1 April 2025. The progress against this is monitored by the Department for Transport and ORR, with regular updates to Parliament." [underlining added]

32. The projects which RIS2 requires remain subject to planning consent (where relevant), and "must remain deliverable and offer sufficient value for money to justify public investment projects" (RIS2 p.92 [**SB/176**]). However, in RIS2, the SofS makes clear that he expects departures from the RIS2 requirements will be "minimal":

[24] It is intended that further 'local capital enhancements' will be made using the £140m 'Safety and Congestion' element of Designated Funds, but these are for HE to determine and are not set out in RIS2: see p.111 [**CB/195**].

> "We will hold Highways England to account on the delivery on the commitments set out in RIS2, but also on their ability to identify schemes that no longer meet the above tests and therefore need to be substantially reconsidered. Given the degree of analysis and design work already completed for RIS2 schemes, however, we would expect these circumstances to be minimal." (RIS2 p.92 [**SB/176**])

33. The analysis and design work referred to in RIS2 was completed before the 2050 Target was suddenly amended in June 2019: HE submitted its draft Strategic Business Plan for approval by the SofS in January 2019[25]. The supporting analysis therefore could not have taken account of the Net Zero Target.

34. Over half of the total funding committed in RIS2 (£14.1 billion out of £27.4 billion – see RIS2 p.119[26] [**CB/203**]) relates to "capital enhancements"; that is, new roads and increasing the capacity of existing roads.

35. New road schemes impact carbon emissions in several ways and will almost always increase them. First, if (which is generally the case) there is extensive land clearance with the subsequent loss of vegetation (particularly mature trees) and soils, then existing carbon 'sinks' are lost. Secondly, there is significant 'embodied' carbon in the concrete, asphalt and other raw materials used to build it (that is, the emissions generated in producing the raw materials). Thirdly, once the road is opened, it may both result in higher vehicle speeds which may lead to more carbon emissions (because an increase in average speeds from 60mph to 70mph causes carbon emissions to go up by about 13%) and because, over time, increased road capacity generates more traffic (as it encourages driving and enables car-dependent development of housing estates, retail parks and business parks. This last phenomenon is known as 'induced' traffic, and – while he recognised it as a

[25] https://www.gov.uk/government/publications/highways-england-annual-report-and-accounts-2019, page 55

[26] Although a figure of £14.7 bn for 'upgrades' is given on p.90 [**CB/174**].

phenomenon in preparation of RIS2[27] – he did not take account of or attempt to quantify the resulting GHG emission increases and thus did not take them into account in his overall evaluation.

36. RIS2 makes a number of very high-level mentions of the need to achieve the Net Zero Target. However, it does not contain any evaluation, assessment or consideration at all of the GHG emissions likely to arise from the schemes to which it commits the SofS and HE. Mentioning Net Zero is plainly not the same as considering the impact of RIS2 on achieving Net Zero. Insofar as RIS2 addresses the substance of the Net Zero Target at all, that is to place exclusive reliance on the potential for a switch from diesel/petrol to electric vehicles ("**EVs**") occurring by 2050. The references to modal shift relate only to short journeys, and so do not propose any viable alternative to most journeys taken on the SRN (i.e. those with which RIS2 is concerned).

37. Thus, in the "Tackling Emissions" section of RIS2 (pp. 26-28) [**CB/110-112**], the SofS set out his intention to increase road capacity in order to reduce additional congestion from projected increases in road traffic. He seemingly did so on the basis that because EVs will be "zero emission" by 2050, any number of them can be compatible with the Net Zero Target for 2050, and that therefore increases in road traffic in the meantime are not a matter for concern. RIS2 deferred proper consideration of these issues to the future Transport Decarbonisation Plan (RIS2 p.26 [**CB/110**]):

> "The UK's first Transport Decarbonisation Plan, due to be completed later this year, will bring together a bold and ambitious programme of coordinated action needed to reach net zero emissions by 2050."

38. EVs make up only a tiny proportion of the current UK vehicle fleet,[28] and in 2020 still only account for 5% of new car sales.[29] The sale of new conventional cars and vans is currently only to be ended in 2040. There is a live consultation on bringing the date forward to 2035, or earlier "if a faster transition appears feasible." However, that

[27] [**SB/115-121**]
[28] Fully electric vehicles account for 0.3% of the UK car fleet, rising to 2.3% if hybrid vehicles are included [**SB/190-191**]
[29] [**SB/189**]

consultation makes no mention of actively retiring conventional vehicles from the road or banning sales of second-hand vehicles. While the SofS did not actually address or consider the point in the context of setting RIS2, had he done so he would have had to confront the fact that it is highly unlikely that emissions savings from EVs could offset emissions increases from additional road capacity in the short to medium term, and (accordingly) that it is unlikely that they could make a significant contribution to achieving the fourth and fifth carbon budgets.

39. RIS2 makes no reference to carbon budgets.

The air pollution impacts of RIS2

40. Increases in road capacity, and therefore road traffic, are also likely to worsen air pollution. RIS2 contains no analysis of the extent, location or timing of the impacts on air quality of the road schemes to which it commits. Although RIS2 imposes a requirement on HE to eliminate exceedances on the SRN in the shortest time possible, it does not analyse whether the schemes which it commits HE to delivering will either help or hinder the achievement of this objective.

Promises to develop a user metric

41. RIS1 had contained representations by the SofS that he would develop, or would require the Interested Party to develop, a metric to measure GHG emissions from use of the SRN. On page 35, RIS1 had stated that:

> "The Government recognises the challenge of assessing the environmental impact of the network. We will work with them, industry and other stakeholders to develop better ways to establish a meaningful way to measure the better outcomes that need to be achieved."[30]

30 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408514/ris-for-2015-16-road-period-web-version.pdf, page 35

42. The Performance Specification section of RIS1 had then made more specific commitments in relation to GHGs arising from use of the SRN:

> **"Requirements**
>
> Demonstrate what activities have been undertaken, and how effective they have been, to improve environmental outcomes. The Company should develop metrics covering broader environmental performance. These should include:
>
> ● A new or improved biodiversity metric; and
>
> ● Carbon dioxide, and other greenhouse gas emissions arising from the use of the Network" [**SB/69**]

43. By March 2015, HE had itself promised to develop a way to record carbon emissions from road users by 2016 and then implement it from 2020:

> "We will also develop a new indicator to determine what vehicle emission levels are from our customers' use of the strategic road network. We will develop the appropriate methodology and complete this work by March 2016." [**SB/72**]

44. In the same Delivery Plan, HE had committed to meeting those promises through developing metrics covering broader environmental performance, including carbon dioxide and other greenhouse gas emissions arising from the use of the network [**SB/72**].

45. In January 2019, HE's Operational Metrics Manual still included the same requirement on HE to develop metrics covering broader environmental performance, including: "Carbon dioxide, and other greenhouse gas emissions arising from the use of the network." [**SB/148-149**]

46. Despite this, RIS2 did not mandate a User Metric as part of HE's Key Performance Indicators. Rather, it only imposed a requirement for HE to measure and monitor only carbon emissions from its own operations (which is a very different prospect):

"Highways England carbon emissions Target:

Reduce Highways England's carbon emissions as a result of electricity consumption, fuel use and other day-to-day operational activities during RP2, to levels defined by baselining and target setting activities in 2020-21."
(RIS2 p. 63) [**CB/146**])

The Strategic Environmental Assessment Regime

47. Directive 2001/42/EC (the "**SEA Directive**") – implemented in domestic law through the Environmental Assessment of Plans and Programmes Regulations 2004 (the "**SEA Regulations**") – explains [Recital 4] that SEA is an:

"… important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

48. The purpose of the SEA Directive is set out in Article 1:

"The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

49. The CJEU has adopted a purposive approach in interpreting the SEA Directive, having regard to its fundamental objective in article 1 (see Case C-567/10 **Inter-**

Environnement Bruxelles ASBL v Région de Bruxelles-Capitale, at [20] to [32]; and the Opinion of AG Kokott in Case C-105/09 **Terre Wallone ASBL v Region Wallonne**, at [29] to [35]).

50. Consistently with the purposive approach, the CJEU has interpreted limitations to the scope of the SEA Directive strictly. In Case C-473/14 **Dimos Kropias Attikis v Ipourgos Perivallontos, Energias kai Klimatikis Allagis**, at [50], the CJEU held:

> "Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, [1] the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly … [2] Any exceptions to or limitations of those provisions must, consequently, be interpreted strictly."

51. Regulation 2(1) of the 2004 Regulations defines the plans and programmes that require SEA as those which: (a) are subject to preparation or adoption by an authority at national, regional or local level; or (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case (c) are required by legislative, regulatory or administrative provisions.

52. A plan or programme is to be regarded as "required" by legislative provisions where legislation regulates the procedure for its adoption, by determining the competent authority and the procedures for preparing it: **Inter-Environnement Bruxelles** at ¶31.

53. Under regulation 5(1), an SEA shall be carried out for all plans and programmes (before their adoption or submission to the legislative procedure) that are: (a) prepared for transport; and (b) set the framework for future development consent of projects listed in Annex I or II to Directive 2011/92/EU.

54. By regulation 5(5)(b), SEA is not though required for something which is merely "a financial or budget plan or programme."

55. Once it is established that a SEA is required for a plan or programme, regulation 12(2) requires that an environmental report is produced that identifies, describes and evaluates the likely significant effects on the environment of both:

> "(a) implementing the plan and programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

56. The requirement to assess "reasonable alternatives" is broader than the obligation under the EIA Regulations 2017, which only require an environmental statement to include a "description" of the "reasonable alternatives studied by the developer".

57. In **Walton v Scottish Ministers** [2012] UKSC 44; [2013] PTSR 51, at [20] - [21], Lord Reed cited the CJEU authorities in support of adopting a purposive approach to the interpretation of the SEA Directive. Thus, the complementary nature of the objectives of the SEA and EIA Directives should be borne in mind. At [14], Lord Reed quoted the Commission's report on the application of the SEA Directive (COM (2009) 469 final, para 4.1 which explained:

> "The two Directives are to a large extent complementary: the SEA is 'upstream' and identifies the options at an early planning stage, and the EIA is 'downstream' and refers to the projects that are coming through at a later stage…."

58. Considering the same distinction between SEA and EIA in her Opinion in **Terre Wallonne**, Advocate-General Kokott said that:

> "31. The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and

concerns the consideration of effects on the environment when development consent is granted for projects.

32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures. Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.

33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

59. That passage was cited with approval in **Friends of the Earth v Secretary of State for Housing, Communities and Local Government** [2019] EWHC 518 (Admin) (at ¶9). In that case, Dove J held that the two key factors determining whether an SEA is required are: (i) is the plan or programme required by legislative, regulatory or administrative provisions?; and (ii) if so, does the plan or programme set the framework for future development consents?

C. GROUNDS OF CLAIM

60. The following grounds of claim are plainly arguable and also raise points of much wider public importance.

Ground 1: failure to take account of mandatory considerations relating to climate change

(i) The Paris Agreement

61. In **Friends of the Earth Ltd v Secretary of State for Transport** [2020] EWCA Civ 214, the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) held that, in setting planning policy of national significance the impacts of the proposed development on the Paris Agreement were so obviously material that they had to be taken into account (at [237]) by the SofS, even though the project to which the Secretary of State for Transport had there given support (a third runway at Heathrow) would still require development consent in the course of which climate change matters would be considered again.

62. The Court of Appeal also held that the commitments and objectives of the Paris Agreement were "Government policy on climate change", which the Secretary of State was obliged by section 5(8) Planning Act 2008 to take into account, but had failed to do so.

63. Here, the SofS required by section 3(5)(a) IA 2015 to consider the impact of RIS2 on the environment. Given that obligation, the logic of the Court of Appeal's decision relating to Heathrow applies here: the objectives of the Paris Agreement were obviously relevant to a plan or programme that committed £14bn to enhancing road capacity, and thus, on the face of it, enabling a significant increase in GHG emissions. Alternatively, the Paris Agreement objectives were part of Government policy on climate change, and given the scale and urgency of the climate change challenge, it was obviously material to consider the interplay between RIS2 and those areas of Government policy that were aimed at tackling climate change. If RIS2 was found to be incompatible with or a hindrance to the achievement of those policies, then there was an obligation to give reasons why RIS2 was nonetheless published.

64. However, RIS2 makes no mention at all of the Paris Agreement. Moreover, it sets out policies that are fundamentally at odds with the objectives of the Paris Agreement. As

explained above in relation to carbon budgets, the effect of RIS2 is to allow emissions to increase in the near to medium term, on the assumption that this will become immaterial (but only later) when the UK fleet transitions to electric vehicles. Such a strategy takes no account of the following important aspects of the UK's commitments under the Paris Agreement including that:

a. The ultimate goals of the Paris Agreement are expressed in temperature terms. All emissions over time matter when seeking to achieve a temperature goal of that kind, because – as noted above - the key determinant of temperature rise is total cumulative emissions, not just whether emissions are reduced to a given level at a specific future date (2050);

b. The UK is committed to pursuing efforts to hold warming to 1.5°C. As the IPCC showed in the Special Report, this will require deep emissions reductions in the next decade;

c. The Paris Agreement (Article 4.1) commits the UK to a global effort to peak emissions "as soon as possible" and to achieve rapid reductions thereafter, and moreover recognises that developed countries should take the lead in this process.

65. However, in setting RIS2 the SofS unlawfully entirely failed to consider its impacts on the securing the objectives of the Paris Agreement.

(ii) CCA 2008 carbon budgets

66. The legislative obligations imposed by the CCA 2008 were likewise mandatory considerations, and for similar reasons: both as obviously relevant policy considerations in their own right, and as aspects of the UK's implementation of the Paris Agreement.

67. The Net Zero Target was adopted in order to meet the UK's obligations under the Paris Agreement. The carbon budgets are intended to be staging posts to meeting that target, as well as embodying the UK's commitments (i) to pursue efforts to limit warming to 1.5°C, which according to the IPCC will require deep reductions in GHG over the next decade, and to (ii) developed countries taking the lead in making the necessary rapid reductions in GHG emissions.

68. RIS2 makes no mention of carbon budgets whatsoever. Its strategy for 'tackling emissions' focuses solely on 2050 (i.e. the end point of the CCA process and not the all-important route by which the UK gets to that point). Its approach is, in summary, to allow increases in road capacity in the near term, relying on the conversion of the UK fleet to zero-emission vehicles by 2050 in order to achieve the Net Zero Target by 2050; but without any consideration of the impact of that on carbon budgets. This poses very obvious and pressing problems for the near to medium term; that is, the period of the fourth and fifth carbon budgets, in circumstances where:

    a. There is already an excess of 16 $MtCO_2$ of projected GHG emissions from domestic transport, compared to what is required to meet the fifth Carbon Budget;

    b. Adding road capacity will increase the level of excess emissions from road transport in the absence of mitigation policies;

    c. The relevant only mitigation policy identified is the switch to electric vehicles – the references to modal shift being relevant only to short journeys, and so not a viable alternative to most journeys taken on the SRN (RIS2 p.27); but

    d. The penetration of electric vehicles into the fleet is likely to remain modest during the period covered by the fourth and fifth carbon budgets. Specifically, the ban on sales of new conventional vehicles is currently only due to take effect eight years after the end of the fifth carbon budget, and current

consultation only proposed bringing this forward to 2035 – three years after the end of the fifth carbon budget; and

e. The RIS2 programme of capacity enhancements will also create significant additional emissions from road construction, some of which fall within the period of the fourth carbon budget, which runs from 2023 to 2027; and also from the additional on-going maintenance both to the new capacity, and to existing capacity (which will require greater maintenance as a result of increased traffic) – effects that will persist throughout the periods of the fourth and fifth carbon budgets.

69. This combination of circumstances reinforced the point that compliance with the carbon budgets is an obviously material (and therefore mandatory) consideration in setting RIS2. But the SofS unlawfully failed even to turn his mind to this issue.

70. In pre-action correspondence the SofS has tried to answer the point by reference to his forthcoming Transport Decarbonisation Plan. But, clearly, that is no answer since, when RIS2 was set, not even the scoping document for that Plan had been published, let alone the Plan itself. The SofS plainly cannot have lawfully discharged his duties to consider matters when setting RIS2 by reference to a Plan that had not yet been developed. The point is one of substance as well as timing: as the subsequent scoping document identifies, it will be necessary to pursue demand management and modal shift (i.e. from cars to other ways of travelling), including for longer journeys, in order to comply with statutory carbon budgets. These are the very strategies which RIS2 had by then already precluded, by requiring schemes which enable continued increases in the use of road vehicles.

(iii) Net Zero target

71. In setting RIS2, the SofS unlawfully failed to consider the need to achieve the Net Zero Target (other than by reference to electric vehicles as above), an approach which ignores the serious (and presumably undisputed) challenges in fully decarbonising road transport, including that:

a. Batteries are not currently envisaged to be a viable power source for Heavy Goods Vehicles, even in 2050, and there are also significant difficulties associated with the use of hydrogen to power HGVs;[31]

b. It is not known whether there are adequate supplies of the rare earth materials used in EV batteries to sustain complete electrification of the UK fleet at a time of rising global demand.[32]

72. All of these challenges will be exacerbated by the increases in road capacity and hence road traffic to which RIS2 commits.

73. Again, RIS2 makes reference to other future Government transport initiatives, such as the Transport Decarbonisation Plan, and the Road to Zero strategy,[33] and insists that "RIS2 is a fully-integrated part of this wider effort to reach net zero emissions". But those take the matter no further, because the actual effect of RIS2 is to increase road capacity and hence traffic and emissions. The SofS has made no attempt to grapple with the contradiction between this effect and the Net Zero objective.

Ground 2: breach of legitimate expectation in relation to user metric

74. As set out above, the Defendant made a clear and unambiguous representation in RIS1 that the Interested Party would be required to develop a User Metric; namely, a methodology for assessing emissions from non-HE vehicles using the SRN. There were no qualifications to that representation. That representation has been reinforced by statements made since then, and as recently as 2019, by HE, a statutory company wholly owned by the SofS, in formal documents such as delivery plans, which would have had input and oversight from the Department for Transport.

---

[31] [**SB/157-158**]
[32] [**SB/159-163**]
[33] DfT, July 2018 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739460/road-to-zero.pdf). 'Zero' in this context refers to zero exhaust emissions vehicles, not the Net Zero Target.

75. These representations gave rise to a procedural legitimate expectation on the part of the Claimant, a campaigning NGO closely concerned with road transport and its environmental effects, that such a User Metric would be included within RIS2, or at least that RIS2 would require HE to take forward such a metric.

76. All of that matters, because without such a metric, it is impossible for the SofS, the ORR or HE properly to understand or manage the increased emissions arising from the schemes and wider management of the SRN to which RIS2 commits.

77. In an unlawful breach of that expectation, RIS2 made no mention of such a metric. As above, the only performance specification relating to GHG is a requirement for HE to monitor GHG emissions from its own operations (which is a completely different thing, and a much less significant source of emissions).

Ground 3: failure to take account of the impact of RIS2 on discharge of duties imposed by air quality legislation

78. Regulation 17 of the AQ Regulations imposes twin duties on the Secretary of State:

    a. To ensure that air pollution levels do not exceed limit values (regulation 17(1)). Where this duty is breached, the remedy is to prepare an Air Quality Plan pursuant to regulation 26: **Shirley v Secretary of State for Housing, Communities and Local Government** [2019] EWCA Civ 22). Such an Air Quality Plan must be a plan to eliminate exceedances 'in the shortest possible time'. As above, the Courts have been rigorous in enforcing this requirement.

    b. Where air pollution levels do not exceed limit values, the duty is to maintain the best possible air quality compatible with sustainable development: regulation 17(2).

79. As follows, each of these duties gave rise to considerations that were obviously relevant to the setting of RIS2 in the context of the duty under section 3(5)(a) to consider the impact of RIS2 on the environment.

80. First, any increase in traffic in an area where air pollution exceeds limit values would, *prima facie*, tend to prolong that exceedance. Accordingly, the SofS needed to consider how committing to deliver a scheme potentially having that effect (as RIS2 did) could be compatible with his Air Quality Plan including, in particular, the requirement to eliminate exceedances in the shortest possible time. This was not done: RIS2 contains no analysis of this issue in relation to the specific schemes to which it commits.

81. The failure to consider these issues is particularly egregious, given that, in relation to exceedances on the SRN, there is no plan in place as required by regulation 26 of the AQ Regulations. The 2017 *UK plan for tackling roadside nitrogen dioxide concentrations* [**SB/104-114**] makes reference to actions by HE but does not require the elimination of exceedances in the shortest possible time.[34] The 2018 update to the 2017 Plan does not stipulate any further action by HE.[35] Thus, at the time of setting RIS2, the SofS could rely only on a *future* programme of work by HE that aspired to achieve the statutory requirement of eliminating exceedances in the shortest possible time. It was accordingly impossible for him to give proper consideration to whether the capacity increases to which RIS2 commits helped or hindered the achievement of the statutory objective.

82. Moreover:

    a. The aspirational target for HE adopted in RIS2 is to eliminate exceedances at only an agreed set of locations that are in exceedance (RIS2 p.62-63[**CB/146-**

---

34 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633270/air-quality-plan-detail.pdf, paras. 120-126

35 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746100/air-quality-no2-plan-supplement.pdf, paras 126-127

147]), rather than all such locations (a point raised with, but not answered by, the SofS in pre-action correspondence);

b. That target, and the 2017 plan, relate only to exceedances of nitrogen dioxide. The SofS has not sought to assess or address exceedances of limit values for other pollutants.

83. Secondly, any increase in traffic and thus air pollution, in an area where air pollution does not exceed limit values, would only be lawful if it were compatible with sustainable development. That sustainable development analysis is one that can only be conducted by balancing the environmental, social and economic costs and benefits of the scheme. The SoS was thus required to consider whether this was the case for the specific schemes to which RIS2 commits, but he failed to do so. Nor did he place any obligation on HE to ensure the best air quality compatible with sustainable development.

84. It is no answer to say (as the SofS did in pre-action correspondence) that this analysis can be left for consideration as part of the grant of development consent for each particular scheme:

a. First, a number of the schemes to which RIS2 commits, including a number of capacity enhancements, would fall within existing permitted development rights, and thus not be subject to any further grant of planning consent. For such schemes, the necessary analysis would not be conducted at any stage.

b. Secondly, as the Court of Appeal made clear in **Shirley**, by the time it comes to an individual planning application, it will be too late. The only remedy following a breach of regulation 17(1) is for the Secretary of State to adopt a plan in accordance with regulation 26. In that regard, the Court of Appeal approved Dove J's observation that he was "unable to read into the legislation any requirement to take particular actions in relation to permits or development consents".

85. This means that consideration of the impact of a project on achieving air quality objectives must take place at a higher, strategic level. Thus, when (as here) taking a decision to give in-principle support to a major programme of road capacity enhancements, the SofS was required to take into account whether that programme was consistent with the Government's obligations and objectives in relation to air quality. This he failed, unlawfully, to do.

Ground 4: failure to carry out SEA

86. The Defendant was required to carry out SEA before setting RIS2, because RIS2 is (1) a plan or programme, (2) required by section 3 IA 2015, which (3) sets the framework for future development consent and (4) is likely to have significant effects on the environment.

87. It is accepted that no SEA was carried out. The SofS says one was not required. Taking each of the necessary elements in turn:

    a. RIS2 is a plan or programme. It is not *merely* a 'financial or budget plan or programme' (which is the aspect of it which SofS focussed on in pre-action correspondence) for the purposes of Regulation 5(5)(b). While, plainly, *one function* of RIS2 is to set the budget for HE over the term of programme, it would be absurd to suggest that that is all it does (or that that element somehow makes invisible all the others). RIS2 is in three parts, only the third of which ('Investment Plan') is concerned with financial planning at all. Even this section goes well beyond setting investment levels; rather, even it discusses what the SofS considers to be the strategic priority areas for investment, and notably, within subsection (d) 'Enhancements', it identifies the specific locations at which it requires road enhancement projects to be taken forward. Consistently with a purposive interpretation of the SEA Regulations, exceptions must be interpreted narrowly: **Dimos Kropias Attikis** (see above para. 50). Regulation 5(5)(b) cannot be read as exempting from the

requirement for SEA any plan or programme that contains *an element of* budget-setting or financial planning: that would drive a coach and horses through the protection offered by the Directive, because almost all infrastructure plans consider the cost of the infrastructure they propose, and it would allow for the bypassing of SEA by the simple device of *adding* financial information;

b. RIS2 was "required by" section 3 IA 2015. Although section 3(1) is framed as a power, when read with section 3(7) the effect overall is to require the SofS to produce a RIS and maintain continuity between one RIS and the next. He was therefore, "required" to set RIS2. Even if that were not sufficient, section 3 IA 2015, read with Schedule 2 regulates the setting of a RIS by specifying the competent authority and determining the procedure for adopting it; it therefore "requires" a RIS in the sense identified by the CJEU in **Inter-Environnement Bruxelles** (see above para. 49)

c. RIS2 "sets the framework for" future development consent. It determines the locations in which the Interested Party is required to pursue development of projects. The requirement on the Interested Party to comply with RIS2 is therefore set out in statute and backed by a statutory scheme that envisages regulatory fines for non-compliance. The SOS expects any departures from the schemes to which RIS commits to be "minimal" (RIS2 p.92 [**CB/176**]). It is no answer to say that these projects will be subject to project-specific EIA as part of any development consent process. First, this will not be so in all cases – some fall within permitted development rights. Secondly, as the authorities cited at paras. 57-58 above make clear, there is a distinction between SEA, which is intended to be a strategic, upstream assessment, and the project-specific, downstream assessment offered by EIA. A national programme of road capacity enhancements of the kind to which RIS2 commits gives rise to broad, strategic environmental questions: is such a programme compatible with climate change objectives? Is it compatible with achieving healthy air quality in the shortest possible time? Only by addressing these questions, and

confronting the cumulative environmental impact, at a strategic level could the Defendant ensure that RIS2 was compatible with sustainable development, and thus achieve the purpose of the Directive. For instance, when the carbon impacts of the road schemes developed pursuant to RIS1 were assessed at an individual project level, the Interested Party invariably took the view that, taken on their own, they were not significant. If these emissions have not been not assessed at a strategic level when setting a RIS, the cumulative climate impact of the RIS is never considered. Further and crucially, by the time of any development consent process, the consideration of alternatives to the roads in question will be precluded. The support for a given road scheme conferred by RIS2 restricts the ability of objectors to argue that the development is not needed; or that Government investment should prioritise modal shift and reducing the need to travel and so forth. These are all matters that need to be considered at a strategic level, but they were not considered in setting RIS2) including through lack of SEA. Rather RIS2 defers these questions to a separate, future process under the Transport Decarbonisation Plan, while foreclosing more sustainable alternative options by requiring and funding capacity enhancements to meet projected increases in demand.

d. RIS2 was likely to have significant effects on the environment: It can hardly be disputed that a national programme of road capacity enhancements would have significant effects on climate change, air quality, and biodiversity.

88. For all of these reasons, the Defendant was required to carry out SEA when setting RIS2, but unlawfully failed to do so.

Conclusion

89. For the reasons above, the SofS failed to discharge his duties under section 3(5) of the IA 2015 and regulation 12 of the SEA Regulations, and unlawfully breached the Claimant's legitimate expectation when setting RIS2.

90. The Claimant seeks permission for a judicial review challenge to the legality of RIS2.

91. In that challenge, the Claimant seeks:

a. Permission to bring this claim;
b. A declaration that the setting of RIS2 was unlawful;
c. An order quashing RIS2;
d. Any other such relief as is necessary to give effect to the Court's judgment; and
e. Costs.

DAVID WOLFE QC

PETER LOCKLEY

1 June 2020